EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Superior Parking Corporation
("Superior Parking")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/513

DATE OF HEARING: November 14, 2000

DATE OF DECISION: December 8, 2000

DECISION

APPEARANCES

David G. Brown, President/Director	for Superior Parking Corporation
Michael Wong	on his own behalf
Diane H. MacLean, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Superior Parking Corporation ("Superior Parking") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 29th, 2000 under file number ER#095-423 (the "Determination").

The Director's delegate determined that Superior Parking owed its former employee, Michael Wong ("Wong"), the sum of $4,727.62 on account of unpaid wages including 3 weeks' wages reflecting compensation for length of service (see section 63 of the *Act*). The delegate rejected Superior Parking's assertion that Wong was not entitled to file a complaint under the *Act* because he was not an "employee".

This appeal was heard at the Tribunal's offices in Vancouver on November 14th, 2000 at which time I heard the evidence and submissions of David G. Brown (Superior Parking's sole principal) and Michael Wong as well as the submissions of Ms. MacLean, on behalf of the Director. In deciding this appeal I have considered the *viva voce* evidence tendered by the parties and the various written submissions that have been filed with the Tribunal.

ISSUE ON APPEAL

Superior Parking's position is set out in a letter to the Tribunal, dated July 20th, 2000 and appended to its appeal form, wherein Mr. Brown asserts that: "Michael Wong from the outset was considered an independent contractor with a vested interest in the company". Mr. Brown further asserts that Mr. Wong can only pursue his claim against either Superior Parking or Mr. Brown personally "through Small Claims Court".

FINDINGS AND ANALYSIS

Superior Parking was a business venture started by Mr. Brown some five years ago. Its business was to patrol parking facilities in a few Vancouver area shopping centres. Its main source of revenue was through the issuance of "parking tickets" to owners of vehicles that overstayed the allotted parking time in the lot or that were otherwise improperly parked (say, parked in a

handicap zone without a valid permit). Superior Parking did not collect hourly parking fees. The business did not prosper and is about to be fully wound up.

Mr. Wong joined the company at the outset of its operations. Sadly, his 20-year friendship with Mr. Brown has soured as a result of these proceedings. This appeal raises the not unusual scenario wherein an individual is engaged on the understanding that he or she will be an "independent contractor" without resort to the statutory standards embodied in the *Act*. Unfortunately, Mr. Brown appears to have embarked on a business venture without fully appreciating the scope of the *Act*.

As this Tribunal has repeatedly stressed, neither the expressed intention of the parties (say, in a written agreement–although, it should be noted, there is no written agreement in this case), nor the superficial form that a relationship may take, determines one's status as an "employee" as defined in section 1 of the *Act*. An "employee" is subject to the direction and control of an "employer"; an "employee" provides services to an employer as directed by that employer; an "employee" uses the tools and equipment of his or her employer in carrying out their assigned tasks; an "employee" relies on their employer for their remuneration rather than being in "business for themselves".

In the case at hand, Wong was engaged by Mr. Brown to provide services to Superior Parking. Wong patrolled Superior Parking's clients' lots and issued parking tickets. He also had some other minor administrative and supervisory tasks. After the first few months of his tenure (which commenced in February 1996), Wong became, in essence, a part-time employee as he had other gainful employment with another firm. Wong, at least prior to December 1998, worked most days but only for a few hours each day in the later afternoon or early evening. Wong's unpaid wage claim spans the period from December 6th, 1998 to March 20th, 1999 when, so says Wong, he worked for Superior Parking without receiving any compensation. During this latter period, Wong only worked about 3 days each week.

While working for Superior Parking, Wong was directed in his efforts by Mr. Brown. Although he used his own vehicle, Wong was fully reimbursed for his fuel and mileage expenses. The "parking tickets" he issued were those of Superior Parking. Prior to December 4th, 1998, Wong was paid an hourly wage for his services. Wong was recorded on Superior Parking's payroll records as an employee and, each year, was issued a T-4 statement of earnings. Wong's pay was subject to the usual statutory deductions and remittances.

Although there were promises that, at some point, Wong might be offered some sort of "partnership" or "ownership" interest in the business, that offer never came to fruition. Mr. Brown conceded at the appeal hearing that there never was any formal "partnership" relationship between himself and Mr. Wong or between Mr. Wong and Superior Parking. Throughout Wong's entire tenure with Superior Parking, Mr. Brown alone directed and controlled the company's affairs.

On or about December 4th, 1998, Mr. Brown realized that the company could no longer continue viable business operations and advised Mr. Wong that the business would be shut down immediately. Although it was Mr. Brown's intention to terminate Mr. Wong's services, no formal written notice of termination was then--or at any other time--issued to Mr. Wong. Mr.

Wong, for his part, encouraged Mr. Brown to continue on with the business (especially through the potentially profitable Christmas period) and offered to defer his wages; Brown agreed to soldier on.

Even if Wong's offer was not, as Wong says, an offer to merely defer his wages but, rather, as alleged by Brown, an offer to forego, wages, Wong still is entitled to be paid for his hours worked after December 4th, 1998. Wong's entitlement to be paid for work done after December 4th, 1998 can be characterized as either a right to recover deferred wages or as a statutory entitlement since the post-December 4th hours (fewer in number than had previously been the case) were worked with the acquiescence of Superior Parking and any agreement to work without pay is void by virtue of section 4 of the *Act.*

Finally, in late March 1999, Wong resigned when he understood that Superior Parking did not intend to pay him his deferred wages. I am of the view that the delegate did not err in determining this "quit" to be a constructive dismissal as defined in section 66 of the *Act.*

I am not satisfied that the delegate erred in issuing this Determination. The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $4,727.62 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal

KWT/bls